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No. 254

IN THE

Supreme Court of the United States

ARGONAUT SAVINGS AND LOAN ASSOCIATION, a Corporation; and CITY SAVINGS AND LOAN ASSOCIATION, a Corporation,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION As Receiver of SAN FRANCISCO NATIONAL BANK,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FEDERAL DEPOSIT INSURANCE CORPORATION As Receiver of SAN FRANCISCO NATIONAL BANK,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGONAUT SAVINGS AND LOAN ASSOCIATION and CITY SAVINGS AND LOAN ASSOCIATION pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in their proceedings No. 21364 on April 3, 1968 affirming the judgment of the United States District Court, Northern District of California, upon a motion for summary judgment, dismissing the complaint with prejudice, dated July 11, 1966.

OPINION

The opinion of the Court of Appeals, Ninth Circuit, is reported at 392 Fed.2d. 195.

JURISDICTION

Jurisdiction of this court is invoked under 28 USCA 1254 (1); involving a judgment of the United States Court of Appeals made April 3, 1968; a petition for rehearing was filed May 2, 1968 and denied May 14, 1968. Federal Court jurisdiction was based upon the defendant Federal Deposit Insurance Corporation being a party, under 28 USCA 1331 as provided by 12 USCA 1819.

QUESTIONS FOR REVIEW

1) May the District Court grant a summary judgment dismissing the action when there are facts stated in the affidavit in support of the complaint showing the plaintiff entitled to recover against the defendant?

2) May the statutory receiver of an insolvent national bank dispose of assets of the bank, its leasehold improvements, without consideration, and without consent of the District Court?

3) Is insolvency of a national bank lessee, requiring the Comptroller of the Currency to close it and appoint a statutory receiver, an anticipatory breach of the lease?

4) Is repudiation of a lease with a liquidated damage clause (in California where CC 3308 permits the parties to the lease to agree to such measure of damages) give rise to a valid and enforceable claim in the liquidation of a national bank by a statutory receivership?

FACTS

A complaint was filed in the United States District Court by the plaintiffs and appellants ARGONAUT SAVINGS AND LOAN ASSOCIATION and CITY SAVINGS AND LOAN ASSOCIATION against the FEDERAL DEPOSIT INSURANCE CORPORATION as receiver of San Francisco National Bank setting forth that on July 12, 1963, a lease was made to certain real property at 220 Battery Street, San Francisco, to run for a term of twenty-five years, to the San Francisco National Bank as lessee. The entire lease is attached as an exhibit to the complaint (R-4-21). The lessor assigned the lease to the plaintiffs as further security for a loan, and the assignment is attached to the complaint as an exhibit (R-22-4). The lessee bank is a party to this assignment and subordination agreement, and therefore there is notice to the assignee binding the bank upon this assignment.

On January 22, 1965, the bank had its doors closed by the Comptroller of Currency, and a liquidator was appointed and the FEDERAL DEPOSIT INSURANCE CORPORATION was appointed receiver of the San Francisco National Bank by the Comptroller of Currency (R-28-31).

On June 28, 1965, the defendant FEDERAL DEPOSIT INSURANCE CORPORATION renounced and repudiated this lease (R-32) and paid one month's rent, the calendar month of July 1965, by the $3,000 check to the plaintiffs, and surrendered possession on July 31, 1965.

No rents were paid by the bank to the assignee plaintiffs nor were any payments made by the assignor on or after December 1, 1964, until after the bank was closed on January 22, 1965. FEDERAL DEPOSIT INSURANCE CORPORATION commenced paying rent

on February 1 and continued paying through July when it abandoned the premises. No rent was paid from December 1 through January (R-42 and Exhibit following affidavit).

The lease (R-14-5) contains a liquidated damage clause.

> "(c) To terminate this lease, in which event lessee agrees immediately to surrender possession of the premises and to pay to lessor as the amount of damage sustained by lessor by reason of lessee's breach of this lease (Lessee agreeing that it would be impractical or extremely difficult to fix the actual damages) a sum of money equal to the amount, if any, by which the then cash rental value of the rent reserved hereunder for the balance of the term of this lease exceeds the then cash reasonable rental value of the premises for the balance of the term at the time of such termination, the claim for which sum shall be immediately enforceable by the lessor against lessee by suit, and shall be proveable in any proceedings for the liquidation or reorganization of the lessee."

Under this provision of the lease, the plaintiffs sought by way of liquidated damages $610,000.00 and by item 23 of the lease (R-17), attorney's fees in this action for liquidated damages for breach of the lease.

Upon the defendant's motion for summary judgment, defendant was granted summary judgment and the cause was dismissed with prejudice (R-44), and the matter duly appealed (R-45).

ARGUMENT

I

Nature of the Statutory National Bank Receivership, As Distinguished from a Judicial Receivership

A national bank is insolvent when it is unable to meet its obligations as they mature, and not by the usual test of assets not equaling obligations.

Smith v. Witherow, 102 Fed.2d 638.

A statutory "receiver" appointed by the Comptroller of Currency for an insolvent national bank is a statutory officer, with duty to realize on the assets of the closed bank and to pay creditors. It is not an equity receiver.

Cooper v. O'Connor, (App. Dist. Col.) 107 Fed.2d 207.

Cooper v. O'Connor, 105 Fed.2d 761.

And the receiver can sell assets only when he is authorized to do so by a court of competent jurisdiction.

Mitchell v. Joseph, 7 Cir., 117 Fed.2d 253.

This statutory receiver is an agent of the Comptroller, not the court, with limited authority. All who deal with him are charged with knowledge of the limitation of his authority.

Oosterhuis v. Palmer, 2 Cir., 137 Fed.2d 322, 153 A.L.R. 475.

And the receiver's power to sell depends upon approval of sale by the court of competent jurisdiction.

Roth v. Hood, 6 Cir., 106 Fed.2d 616.

The insolvency of a national bank, and the appointment of a receiver does not work dissolution of the authority of the bank corporation to make transactions, not forbidden.

Hiatt v. Warren, 5 Cir., 44 Fed.2d 313.

Hayes v. Wilkinson, 10 Cir., 72 Fed.2d 201.

The statutory "receiver" does not have authority to dispose of property of the insolvent bank other than by sale.

Jackson v. McIntosh, 5 Cir., 12 Fed.2d 676.

There has been no direct adjudication in which an appellate court has determined whether the statutory "receiver" appointed by the Comptroller of Currency to liquidate an insolvent national bank can reaffirm leases, or other executory contracts. There are appellate court decisions that pass upon collateral matters, but do not discuss this authority.

It has been not only determined by the *Jackson* case (12 Fed.2d 676) that this "receiver" does not have authority to dispose of property other than by sale, but it has also been directly held that such a "receiver" is bound by the valid contracts of the bank subsisting at the time of his appointment, and that he has no power to impair the obligation of a valid contract so far as the parties are concerned.

Kaercher v. Citizens Nat. Bk., 8 Cir., 57 Fed.2d 58.

The *Kaercher* case (57 Fed.2d 58) involved an action for breach of a contract, made by a national bank when the plaintiff gave a note in which it was an accommodation maker, and in which contract it was agreed that the bank would not transfer or sell or bring any suit upon the note. Upon the insolvency of the bank, the "receiver" appointed by the Comptroller brought suit upon the notes, and judgment was rendered for the maker of the note. Thereupon the maker of the note sued for $2,050.00 attorney's fees occasioned by the

breach of the bank's contract. The Eighth Circuit held that a receiver stands in no better position than the bank, and that he had breached this contract, and that he could not impair by his acts any valid contract subsisting at the time of his appointment. He has no power to impair the obligation of a valid contract as far as the parties are concerned.

B. Court Receiver. Receivership is an equity ancillary remedy. It is an incident to, and an aid of equity jurisdiction. Its object is to secure and preserve property in controversy, pending litigation so it may be subjected to the order or decree of the court as may be rendered.

53 C.J. 19, Receivers 3.

It is ancillary and provisional in character and not the final relief nor the object of the litigation. It is merely ancillary to the equitable relief in the principal action or final or ultimate relief.

53 C.J. 22, Receivers 5.

A receiver is an officer of the court, and the property is in the custody of the court. It is a duty of the receiver to protect the property for the court. It is therefore grown up in the law of receivers that a receiver is generally given the right to adopt or reject executory contracts made prior to his appointment, and this power is subject to the control of the court. If the receiver, with permission of the court appointing him elects to perform a contract, he is bound by the contract, and he takes the contract cum onere and all of the obligations in connection therewith are obligations of the receiver incurred in his receivership, and are a preferred charge on the assets in his hands. It is generally stated that a receiver is not required to assume the performance of

executory contracts, as they can be a burden upon the assets in the hand of the court being held and preserved for the outcome of the litigation.

C. Statutory "Receiver". This practice or rule would have no application to a statutory "receiver" appointed by a Comptroller of Currency for the insolvent national bank, whose sole duty is to take possession of the property of the insolvent bank, sell it, and liquidate for the benefit of the creditors, and distribute it to these bank creditors.

A "statutory" receiver for an insolvent bank has the duty to liquidate all assets of the bank. It has the duty to distribute the proceeds of all creditors of the bank.

Let us assume a situation where a bank has $4,500,000 capital and surplus of a total of approximately $50 million assets of which approximately 1.5 million is in physical assets almost all of which is in leasehold improvements on long term leases for its home office and two branches. Its main office is unfortunately on two leaseholds, one on the corner and one adjoining the corner. The leasehold improvements have changed the corner parcel into the bank proper and the adjoining leasehold is converted at a couple of hundred thousand dollars into the "operations room" for the bookkeeping, the basement into toilet facilities for the entire unit. An employee's cafeteria is built in the basement of the adjoining leasehold. Offices are placed in the second floor above the operations room. As the two leaseholds have utility and value as premises for a financial institution, whether one the FDIC is charged by law to open to keep competition in the area or to sell the leaseholds with improvements because it represents a third of the capital and surplus of the bank. To repudiate the leases is to make the corner leasehold of little or no value for

want of its adjoining parcel into which it has been integrated as a unit. The adjoining parcel under a separate leasehold would be even less valuable for it is no longer usable except with the corner, without extensive alterations. A repudiation of this lease is certain to result in great damages, and not only is the value of the leasehold improvements lost but additional liabilities are incurred. The statutory "receiver" should not be permitted to lose this asset.

It may well be that such a statutory "receiver" would want to justify the actions of closing a bank which had not to the date of closing defaulted on any obligation nor failed to meet its obligations as they were presented, by losing a third of the assets above the obligations shown in the bank's statement and even in the audit made as of date of closing, so that statutory receiver can justify a 20-year project for liquidation. Should the statutory "receiver" repudiate the contract, it would create a liability for breach of a valid contract.

In such a situation, it would be neither fair nor equitable for the statutory "receiver" to lose such extensive assets of the bank, nor is he authorized by the statutes to do so. A valid contract and lease in effect at the time the "receiver" is appointed, remains in effect; and if there is a breach, either before or after the appointment, the bank and its property is liable for this breach.

The statutory "receiver" has a duty to liquidate all assets, and not breach leases and lose nearly $1.5 million of leasehold improvements. Leases, as executory contracts, are valid and binding. They should not be breached and if breached they are compensable in damages. Insolvency breached the lease as it does other executory contracts, and the liquidated damages therefor are proveable claims and debts to be paid along with

the other obligations of the bank. Whether the bank be in fact, insolvent, or not, in any event, the repudiation of the lease would give rise to the claim for liquidated damages in the lease.

II

Insolvency Is an Anticipatory Breach.

Executory contracts are breached by insolvency or bankruptcy of a promiser to the contract. There is an implied promise in all contracts not to become insolvent or bankrupt and thus disable oneself from peforming the contract.

Central Trust Co. v. Chicago Auditorium Theatre, (1915) 240 U.S. 581, 60 L. Ed. 811.

Anticipatory breaches are recognized under California law.

Caminetti v. Manierre, 23 Cal.2d 94, 142 Pac.2d 741.

Whether or not the statutory receiver repudiated the lease after the occurrence of the insolvency, or not, the insolvency is an anticipatory breach, giving rise to a cause of action under the liquidated damages provisions of the lease.

III

Repudiation of a Lease with a Liquidated Damages Clause Gives Rise to a Valid and Enforceable Claim.

A lease with a liquidated damages clause, disaffirmed by a judicial receiver, is a proveable claim.

Gardner v. Butler & Co., (1917) 245 U.S. 603, 38 S. Ct. 214.

Wm. Filene's Sons Co. v. Weed, (1917) 245 U.S. 597, 38 S. Ct. 211.

The rule is otherwise if there is no liquidated damages clause, for on termination of the lease there is no further claim of the landlord, at common law.

Gardner v. Butler & Co., 245 U.S. 603.

A claim for damages or rentals under a valid lease accruing after the appointment of a judicial receivership is proveable in the receivership as a claim, if it is liquidated (made certain) before distribution of assets to the creditors, by judgment for damages.

Dickinson v. Universal Service Stations, 9 Cir., 100 Fed.2d 753.

After the decision of *Manhattan Prop. v. Irving F. Co.*, 290 U.S. 230, the predicament of landlords whose leases are disaffirmed in bankruptcy by the trustee was brought to the attention of Congress who amended the bankruptcy law and the landlord's claim is now proveable in bankruptcy by express statute.

City Bank Co. v. Irving F. Co., (1936) 299 U.S. 433.

This case does not involve bankruptcy nor the Bankruptcy Act. It does not involve a court receivership. It does involve a lease with a liquidated damages clause. It involves insolvency of the lessee. It is a clear case of anticipatory breach of the lease by the lessee. It is doubly reinforced by a clear repudiation of the lease by the lessee's statutory "receiver", soon after insolvency was made public by the closing of the bank by the Comptroller of the Currency.

In any event the lease was valid and enforceable and rent fell due to the assignee of the lease, and this rent was not paid and is still unpaid.

The lease was breached by the lessee's insolvency and thereafter by the statutory "receiver's" repudiation and abandonment of the premises. Under the liquidated

damages provisions of the lease it is a valid claim, and enforceable as such, against the bank and its assets (C.C. 3308).

If only debts matured and due at the time of the bank's closing are proveable debts, we should observe all savings accounts and time deposits are payable by force of the bank's by-laws only after thirty (30) days written notice and then only to the extent it does not affect the bank's liquidity (no loans to be made in the meantime). Certificates of deposit are not due until their maturity date appearing on the certificate. Obviously all obligations of the bank and all claims for breach of contract are to be paid from the bank's assets, regardless of their due date.

Where as here, there is a liquidated damages clause in the lease, there is first insolvency of the lease and, secondly, lessee's statutory receiver repudiated the lease and abandoned the premises, the lessor's assignors may recover damages for the breach forthwith.

IV

The Ninth Circuit Decision in This Case Follows and Cites a First Circuit Decision in Which Certiorari was Granted by This Court.

The lower court decision for which certiorari is requested cites, follows and turns upon *Kennedy v. Boston-Continental Nat'l. Bk.* (1 Cir., '36) 84 Fed.2d 592 (Cert. granted 299 U.S. 533, case dismissed on motion of plaintiff 300 U.S. 533) holding that in Massachusetts, a national bank's insolvent estate was not liable for damages where the statutory receiver notified the lessor of the election not to assume the lease after the bank was closed. This decision contains a very able dissent by Justice Morton pointing out that the allowance of a claim depends upon whether the equitable or bankruptcy rule be followed, the equitable rule being

the *Filene* case (245 U.S. 597) and bankruptcy rule, the *Manhattan Prop. v. Irving Trust* case (290 U.S. 320); and the National Bank Act provides for a complete statutory system for liquidation of insolvent banks and the administration is on equitable principles.

The bankruptcy rule has been changed by statute since the *Manhattan* case (290 U.S. 320) because of the harshness of that rule. A contrary rule to that of the *Kennedy* case (84 Fed.2d 592, cert. granted 299 U.S. 533) prevailed in other circuits as for example *First National Bank of Chicago v. First National Bank of Wheaton* (7 Cir., '35) 78 Fed.2d 502 where there is an excellent discussion of the law and the anticipatory breach doctrine and equitable rule were applied. See also *Leo v. Pearce Stores* (DC-Mich. '32) 54 Fed.2d 92 discussing *in re Mullings Clothes* (2 Cir., '16) 238 F. 58, and *Penn. Steel Co. v. N.Y. City Ry. Co.* (2 Cir. '12) 198 F. 721.

Certiorari was granted in *Kennedy v. Boston-Cont. Nat'l. Bk.* case (supra) at *299 U.S. 533* and the case was dismissed on the motion of the plaintiff in *300 U.S. 684*, thus denying us the benefit of a decision of this Court on this important question.

Where certiorari is granted by this court, it shows that there is sufficient grounds to grant it in this case involving the same question of law. In addition, we have the added questions of the state statute granting such a right to conract for liquidated damages in leases, and we have the question of a statutory receiver's power to dispose of leasehold property without consent of any court, when consent is required for a sale of compromise of a claim.

V

Summary Judgment Can Not Be Granted Where the Affidavit of the Plaintiff Shows a Right to Recover.

The above action was one for monetary judgment, and the facts appear *without issue* that no rent of any kind was paid for December nor for January. The bank was closed January 22. No rent was paid for the possession of the statutory receiver for any part of January. Rental payments started for February and continued through July when the premises were abandoned. The plaintiff is thus entitled to judgment for the two months' rental of $3,000 a month, a total of $6,000 plus attorney's fees and interest. The trial court erroneously granted summary judgment dismissing the complaint and entered judgment for the defendant in face of these facts.

Where facts in affidavits upon motion for summary judgment justify an amendment, such amendment should not be prevented by a final judgment.

Rossiter v. Vogel, 2 Cir., 143 Fed.2d 908.
6 Moore's Fed. Prac. 2127.

And it may be treated as though the pleadings were amended to conform to the facts set forth in the affiidavits.

Seaboard Term. Corp. v. Standard Oil Co., 2 Cir., 104 Fed.2d 659.

Here there was no issue of fact, and not a mere conflict which will prevent a summary judgment. The summary judgment could have been entered for the plaintiff, certainly not against it.

CONCLUSIONS

This petition sets forth and raises several very important and urgent questions that should be resolved by this Court.

Justice demands that a writ issue and be granted and that these matters be adjudicated by this court.

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Appendix Follows